SUPREME COURT, U. S.
Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-753

JOSEPH FRANCIS CAPUTO and JAMES MICHAEL CAPUTO,

Petitioners,

versus

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the State of New York Supreme Court, Appellate Division of the Third Judicial Department.

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In The

Supreme Court of the United States

October Term, 1973.

No.

Joseph Francis Caputo and James Michael Caputo,

Petitioners,

versus

The People of the State of New York,

Respondent.

Petition for a Writ of Certiorari to the State of New York Supreme Court, Appellate Division of the Third Judicial Department.

The petitioners, Joseph Francis Caputo and James Michael Caputo, respectfully pray that a writ of certiorari issue to review the judgment of the State of New York Supreme Court, Appellate Division of the Third Judicial Department, entered in this proceeding on March 27, 1973, the order denying rehearing entered on August 15, 1973.

Opinions Below.

The opinion of the New York State Supreme Court, Appellate Division of the Third Judicial Department, a three-to-two decision, a copy of which is set forth as Appendix A to this petition, is reported as *People v. Caputo*, 41 A. D. 2d 165 (341 N. Y. S. 2d 920) (1973). A copy of the decision of the State of New York Supreme

Court, Appellate Division of the Third Judicial Department, denying the petitioners' motion for resettlement of the order of reversal is set forth as Appendix B to this petition. A copy of the order of the New York State Supreme Court, Appellate Division of the Third Judicial Department, denying the petitioners' application for a certificate granting leave to appeal to the New York State Court of Appeals is set forth as Appendix C to this petition. A copy of the order of the New York State Supreme Court, Appellate Division of the Third Judicial Department, denying the petitioners' motion for reargument of the appeal is appended hereto as Appendix D.

Jurisdiction.

The judgment of the New York State Supreme Court, Appellate Division of the Third Judicial Department, which is sought to be reviewed was entered on March 27, 1973. The timely motion seeking resettlement of the judgment of reversal and an application for a certificate granting leave to appeal to the New York State Court of Appeals were denied on May 23, 1973. A timely petition for reargument of the appeal was denied by an order entered August 15, 1973. The present petition for a writ of certiorari is being filed within ninety (90) days of the date of entry of the order denying the motion for reargument of the appeal.

The petitioners invoke the jurisdiction of this court under Title 28, United States Code, Section 1257(3).

Questions Presented.

1. May an informer's tip, which not only fails to set forth the circumstances underlying the informer's acquisition of his information and the means by which the informer reaches his conclusions but also fails to

provide any specific and detailed information, constitutionally create probable cause?

2. Is the amount of information necessary to validate a warrantless arrest at least of the same quantity and detail as that required for the issuance of a warrant?

3. When the police officer stopped the vehicle of the petitioners and secured the operator's license and the vehicle's registration, did an arrest of the petitioners take place?

4. Is the characterization of the petitioner, Joseph Francis Caputo, as a dealer in drugs, based on months-old information, entitled to any weight in determining the existence of probable cause?

5. Where a police officer does not know the nature or type of the drugs or the location in the vehicle of the drugs, may he, after stopping the vehicle, conduct a warrantless, non-consensual search of the vehicle's trunk?

6. May a police officer's observation of contraband in open view be considered on the issue of the existence of probable cause if that officer had no legal right to be in the position from which he made his observation?

Constitutional Provisions Involved.

United States Constitution, Amendment IV:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

A. History of the case.

By indictments returned by an April 1972 Term of a Washington County Supreme Court Grand Jury, the petitioners were charged with criminal possession of a dangerous drug in the third degree in violation of Section 220.20 of the Penal Law of the State of New York and unlawfully possessing noxious material in violation of Section 270.05 of the Penal Law of the State of New York (Cl. Tr., pp. 4-5).[1] The petitioner, Joseph Francis Caputo, was also charged with the crime of possession of a dangerous weapon as a felony in violation of Section 265.05(2) of the Penal Law of the State of New York (Cl. Tr., p. 4). Petitioners entered pleas of not guilty to the indictments, and thereafter moved, pursuant to Article 710 of the New York Criminal Procedure Law, to suppress the items which they were charged with possessing (Cl. Tr., pp. 6-12). The basis for the suppression motion was that the items searched for and seized were obtained in violation of the petitioners' constitutional rights under the Fourth Amendment. Pursuant to the suppression motion, a suppression hearing was held at which testimony was taken from the police officers involved and the petitioners (Cl. Tr., pp. 71-222).

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[1]Reference is to the clerk's transcript of the record on appeal, a certified copy of which has been filed with this court.

Following the hearing, a memorandum of law was submitted by the attorney for the petitioners (Cl. Tr., pp. 15-40) and a memorandum of law was submitted by the Washington County District Attorney's Office (Cl. Tr., pp. 41-57). By decision dated July 20, 1972, the trial court granted the motion to suppress and suppressed all items which the petitioners were charged with possessing. The trial court found that the police officer had not had probable cause to stop and search the petitioners' vehicle, and that, therefore, the search and seizure were constitutionally prohibited.

The respondent appealed to the New York State Supreme Court, Appellate Division of the Third Judicial Department, from the order of suppression. By decision dated March 22, 1973, that court reversed the decision and order of suppression of the trial court in an opinion set forth, in Appendix A, *infra*, and reported as *People v. Caputo*, 41 A. D. 2d 165 (341 N. Y. S. 2d 920) (1973). The Federal constitutional questions were raised both by the record on appeal filed with that court and the briefs filed with that court. The prevailing opinion of that court, in its three-to-two decision (see Appendix A, *infra*), recognized that whether a search is reasonable depends upon whether probable cause existed to sustain the arrest and search, but then held that the totality of the circumstances justified the search and seizure, and the arrests of the defendants. In sum, the bare majority of that court found that the police officer's conduct had complied with the Fourth Amendment. The dissenting justices (see Appendix A, *infra*) held that the information supplied by the unidentified informer could not constitutionally establish probable cause and that, therefore, the police officer's conduct was violative of the Fourth Amendment and mandated suppression of the evidence.

On May 23, 1973, the New York State Supreme Court, Appellate Division of the Third Judicial Department, denied a timely motion seeking resettlement of the judgment of reversal (see Appendix B, *infra*) and also denied an application for a certificate granting leave to appeal to the New York State Court of Appeals (see Appendix C, *infra*). By an order entered August 15, 1973, that court denied a timely petition for reargument of or a rehearing on the appeal (see Appendix D, *infra*).

B. Statement of facts.

On March 26, 1972, the vehicle being operated by the petitioner, Joseph Francis Caputo, a paraplegic, and in which the petitioner, James Michael Caputo, was riding as a passenger, was stopped by a trooper, James Werthmuller. It is conceded that the car was not stopped because of a violation of any vehicle and traffic law or regulation, that the operator's license and registration were in order, that the trooper observed nothing suspicious or illegal about the operation of the vehicle, that the trooper observed nothing suspicious or illegal prior to asking the petitioner, James Michael Caputo, to get out of the car and that the express purpose of Trooper Werthmuller in stopping the car was to search for drugs. It is further conceded that the only basis for a belief that there were drugs in the car was a 30-second conversation with an unidentified informant over the telephone earlier that afternoon. The unidentified informer had advised Trooper Werthmuller only that "Joseph Caputo" or "Joseph Caputo and his brother" or "the Caputos" were "enroute to" or were "coming up to" Fort Edward with a "supply of drugs." The versions of the 30-second conversation varied with each occasion Trooper Werthmuller related the conversation. In some versions, Trooper Werthmuller stated that he was also informed that Joseph Caputo would be using his car, a blue Ri-

viera with Florida registration plates. The information with respect to the color, type and registration of the vehicle was concededly unilluminating as Trooper Werthmuller was familiar with the vehicle by reason of a prior observation and the vehicle was well known in the Fort Edward area as it was specially adapted to Joseph's paraplegic needs. The information that the Caputos were "enroute to" or were "coming up to" Fort Edward was completely erroneous as the Caputos had been home for a period of two days. Concededly, the unidentified informant failed to advise Trooper Werthmuller where the Caputos were coming from, what type of drugs were involved, where the drugs were located, what was to be done with the drugs, the quantity of drugs involved, the route of arrival, the packaging of the drugs or provide any additional specific detail. Furthermore, the unidentified informant did not relate to Trooper Werthmuller the means by which he came by his knowledge. Trooper Werthmuller, while proceeding west on Route 197 on routine patrol, observed the Caputo vehicle proceeding in an easterly direction along that route toward Fort Edward. He turned his troop car around, alerted a Trooper Kelleher and asked him to assist in the stopping of the Caputo vehicle, and thereupon followed the petitioners into Fort Edward where he stopped their car. The trooper then proceeded to the petitioners' car and asked the petitioner, Joseph Caputo, to produce his license and the registration for the vehicle. This was done promptly and these were in order. However, Trooper Werthmuller retained the license and registration. He then walked around the car over to the passenger side where he directed the petitioner, James Michael Caputo, to identify himself, which the petitioner did. The trooper then opened the door to the car and directed the petitioner, James Caputo, to get out of the car. As James Caputo was emerging from the

car, Trooper Werthmuller claims to have noticed the head or top of a Mace can on the front floor of the vehicle with the head or top protruding from beneath the seat by the console. He also claims to have observed some scales in the back seat. The trooper then ordered James Caputo to the rear of the vehicle, returned to the car and demanded that Joseph Caputo surrender the keys to the trunk. It was during the exchange of the keys that Trooper Werthmuller claims to have seen a box of .25 calibre pistol ammunition on the top of the console in the interior of the car. After seizing the keys from Joseph, Trooper Werthmuller returned to the rear of the vehicle where, without the consent or permission of either of the petitioners, he opened the locked trunk. A search of the trunk produced green plastic bags containing marijuana. The trooper then seized a locked suitcase from the trunk of the car which he proceeded to break open. The suitcase was found to contain additional marijuana. During this period, additional police officers had arrived and a subsequent search of the petitioner, Joseph Caputo, uncovered a .25 calibre pistol. There was never a search warrant or arrest warrant, nor was any effort ever made to obtain either.

C. How the federal questions arose.

The constitutional legality of the police officer's conduct in stopping the vehicle, searching the vehicle, opening the trunk and seizing the marijuana from the vehicle and trunk and then the locked suitcase and the subsequent search of the petitioner, Joseph Caputo, were all raised by the pre-trial motion to suppress the evidence as was the constitutional sufficiency of the unidentified informant's tip (Cl. Tr., pp. 8-12). These constitutional issues were then again discussed in the memorandum of law submitted by the attorney for the petitioners (Cl. Tr.,

pp. 15-40) and the memorandum of law submitted on behalf of the respondent (Cl. Tr., pp. 41-57). The issues were then passed upon and resolved in the petitioners' favor by the state trial court by its decision dated July 20th, 1972 (Cl. Tr., pp. 58-68). The trial court based its holding on the Fourth Amendment to the United States Constitution, as interpreted by this court's decisions in *Aguilar v. Texas*, 378 U. S. 108; *Spinelli v. United States*, 393 U. S. 410; *Giordenello v. United States*, 357 U. S. 480, and *Henry v. United States*, 361 U. S. 98. Upon the appeal from the state trial court's decision, the issues were again raised in the briefs submitted to the appellate court on behalf of the petitioners and on behalf of the respondent. The issues were then passed upon by the New York State Supreme Court, Appellate Division, Third Judicial Department, and resolved in favor of the respondent, *People v. Caputo*, 41 A. D. 2d 165 (341 N. Y. S. 2d 920) (1973) (see Appendix A, *infra*). The prevailing opinion was predicated on the Fourth Amendment to the United States Constitution, as interpreted by this court's decisions in *Carroll v. United States*, 267 U. S. 132; *Brinegar v. United States*, 338 U. S. 160; *Cooper v. California*, 386 U. S. 58, and in *McCray v. Illinois*, 386 U. S. 300. The dissenting opinion was also based on the Fourth Amendment as interpreted by this court in its decisions in *Aguilar v. Texas*, 378 U. S. 108, and *Harris v. United States*, 390 U. S. 234.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED.

I.

The decision below is in sharp conflict with the applicable decisions of this court; as the court below, in reversing the trial court's order of suppression and sustaining the constitutional sufficiency of the informer's tip, has ignored the pertinent constitutional standards previously enunciated by this court.

This court has repeatedly held that, for an unidentified informant's tip to constitutionally furnish probable cause, there must be an adequate demonstration not only that the informant was reliable, but also that his information was reliable. This is the two-pronged test enunciated by this court in *Aguilar v. Texas*, 378 U. S. 108, and reaffirmed in *Spinelli v. United States*, 393 U. S. 410. The appellate court below completely ignored the constitutional requirement that there be a demonstration of the reliability of the information imparted by the unidentified informer and its holding is, therefore, diametrically inconsistent with holdings of this court. At the time the trooper stopped the Caputo vehicle, the stop concededly effected for the sole purpose of searching the Caputo vehicle for drugs, the officer's own observations had furnished no incriminating facts. Furthermore, after stopping the vehicle, his check of the vehicle's registration and of the operator's license of the petitioner, Joseph Caputo, also failed to develop any incriminating facts. Thus, his own observations coupled with his independent investigation were wholly insufficient to develop probable cause for a search of the vehicle. Moreover, his observations and independent investigation furnished no corroboration for the limited incriminating facts supplied by the unidentified informant. In fact, there was no

corroboration of the incriminating information supplied by the unidentified informer until the police officer opened the trunk of the car and found the green bags containing marijuana. As the officer's own observations and independent investigation could furnish nothing toward establishing probable cause to stop and search the vehicle for drugs, it was necessary to look to the information supplied by the informants for probable cause. Therefore, an examination of the underlying circumstances as to how the informant came by his information was constitutionally required and a finding that the informant's information met the constitutional standards of reliability was a prerequisite to a finding of probable cause. An examination of the information furnished by the unidentified informant discloses that there was nothing within the informer's statements to establish a basis for the reliability of the information imparted. The informer did not indicate whether the information being supplied was based on personal observation or knowledge. Nor did the informer recite any underlying circumstances from which the informant reached his conclusions. In the face of these omissions, the informer's tip could not constitutionally provide, under the standards enunciated by this court in *Aguilar v. Texas, supra,* and *Spinelli v. United States, supra,* a sufficient basis for finding of probable cause. Yet, the prevailing opinion of the appellate court below found probable cause and clearly did so by ignoring the constitutional requirement that the reliability of the information as distinguished from the reliability of the informant also be established. The decision of the appellate court below cannot be reconciled with the decisions of this court in *Aguilar v. Texas, supra,* and *Spinelli v. United States, supra.* In fact, the information provided in both the *Aguilar* case and the *Spinelli* case was more substantial, more detailed and in its detail and specificity more reliable than that provided in the instant case. Here, not only did the informant fail to identify how

he came by his knowledge, but he also failed to indicate what type of drugs was involved, what quantity of drugs was involved and where the drugs were located, whether on the petitioners or in the vehicle, and, if in the vehicle, where within the vehicle. This type of information is insufficient to indicate that an informer is relying on anything more substantial than casual rumor. Clearly, the prevailing opinion of the appellate court below can be explained only on the basis of a misapprehension of the doctrine enunciated in the *Aguilar* and *Spinelli* decisions or rejection of those decisions. In view of the diametric inconsistency between the decision of the New York State Supreme Court, Appellate Division of the Third Judicial Department, and the opinions of this court, review should be granted.

II.

The decision of the court below is in sharp conflict with the applicable decisions of this court on the issue of the constitutionally permissible scope of vehicular searches.

The decision of the appellate court below sanctions a warrantless, nonconsensual, exploratory search of the trunk of the petitioners' vehicle. This result is wholly incompatible with the decisions of this court in *Coolidge v. New Hampshire*, 403 U. S. 443, and *Chimel v. California*, 395 U. S. 752. Clearly, on the facts of this case, the search of the trunk of the vehicle was overbroad under the principles enunciated in *Chimel v. California, supra*, and *Coolidge v. New Hampshire, supra*. The search of the trunk by the police officer was concededly not designed to protect himself, prevent the petitioners from escaping or preserve evidence which the petitioners might try to conceal or destroy. It was, very simply and

admittedly, an exploratory search for drugs. Although the police officer did not know what kind of drugs he was looking for, how, if at all, they were packaged, in what quantity they existed or where they were located, he was, at the time he opened the trunk, nonetheless, looking for such contraband. Admittedly, the incidental search was not limited to the person of the petitioners or the area within the petitioners' immediate control and reach and from which the petitioners might be able to reach a weapon or destructible evidence. The trunk was an area well beyond the reach of the petitioners and was an area into which they clearly could not go for a weapon or for destructible evidence. It is clear that the police officer was simply striking out blindly in the hope that his explorations would uncover the drugs. This type of wide-ranging exploratory search is categorically impermissible under the decisions of this court in *Chimel v. California, supra,* and *Coolidge v. New Hampshire, supra.* In order for the appellate court below to reach the result it did, it had to either circumvent or reject the principles announced by the *Chimel* and *Coolidge* decisions. Clearly, the appellate court below has departed, either inadvertently or intentionally, from the guidelines set forth by this court in *Chimel* and *Coolidge.*

III.

The decision below, if allowed to stand, carries implications and gives directions far beyond the facts of this case on the constitutional standards applicable to informers' tips and permissible scope of automobile searches.

The unilateral departure of the New York State Supreme Court, Appellate Division of the Third Judicial

Department, from binding constitutional doctrine previously announced by this court, if allowed to stand, would signal the extinction of the constitutional limitations imposed on informants' tips and automobile searches and would herald a new and unwarranted restriction on the right of the citizens of New York to be free from unreasonable searches and seizures. As a consequence of the appellate court's decision, the reliability of the information imparted by an unidentified informant is no longer one of the criteria to be examined in determining whether the informant's tip furnishes an adequate basis for probable cause. This is wholly incompatible with prevailing constitutional doctrine. The court's decision has also opened the door to general exploratory searches of automobiles in the State of New York. Once again, this should not be and is not permissible under the prevailing Supreme Court decisions. In short, the lower appellate court has altered constitutional doctrine in order to achieve a reversal of the trial court's order of suppression and, in so doing, has established impermissibly different constitutional standards for informers' tips and the search of automobiles. If this decision is allowed to stand as precedent, there will be wholesale violations by New York police officers of constitutional rights under the Fourth Amendment as interpreted by this court in the *Aguilar*, *Spinelli*, *Chimel* and *Coolidge* cases.

Conclusion.

In view of the vital nature of the Federal constitutional issues presented in this petition and the conflict between the decision of the lower appellate court and the decisions of this court, the petitioners respectfully submit that a writ of certiorari should issue to review the decision of the New York State Supreme Court, Appellate Division of the Third Judicial Department, and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A.

Opinions of Appellate Division—Third Department.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

March 22, 1973.

19896

19896A

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

v.

JOSEPH FRANCIS CAPUTO,

Respondent.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

v.

JAMES MICHAEL CAPUTO,

Respondent.

Order reversed, on the law and the facts, and motions to suppress evidence seized from the automobile, denied.

Opinion per Staley, Jr., J.

Main, J., concurs; Herlihy, P. J., concurs in a separate opinion; Greenblott, J., dissents and votes to affirm in an opinion in which Cooke, J., concurs.

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

#19896

#19896A

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

JOSEPH FRANCIS CAPUTO,

Respondent.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

JAMES MICHAEL CAPUTO,

Respondent.

Submitted, January 15, 1973.

Before:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Ellis J. Staley, Jr.,
Hon. Louis M. Greenblott,
Hon. Lawrence H. Cooke,
Hon. Robert G. Main,
Associate Justices.

Appeals from an order of the Washington County Court (Julian V. D. Orton, J.), entered August 3, 1972, which granted defendants' motion to suppress evidence.

Philip A. Berke, District Attorney, for appellant, 43 Main Street, Granville, New York 12832.

E. Stewart Jones, Jr., for respondents, 28 Second Street, Troy, New York 12181.

STALEY, Jr., J.:

These are appeals from an order of the County Court of Washington County, entered August 3, 1972, which granted a motion by defendants to suppress evidence.

The facts are not in dispute. On March 26, 1972, in the late afternoon, Trooper Werthmuller received a telephone call at the New York State Police substation at South Glens Falls from a confidential informer, conceded by defendants to be reliable, who advised him that defendants were on their way to Fort Edward with a supply of drugs; that they were driving a blue Riviera car with Florida registration plates, and should be arriving there shortly. Trooper Werthmuller advised the deskman of the telephone call and, while proceeding to Fort Edward, radioed Trooper Kelleher advising him of the call. As he was proceeding west on Route 197, Trooper Werthmuller observed defendant, Joseph Caputo, driving a blue Riviera with Florida registration in an easterly direction towards Fort Edward and with a passenger in the front seat. He turned his troop car around, alerted Trooper Kelleher, and followed defendants into Fort Edward where he stopped defendant's car on Broadway near the school, about 15 minutes after the informant's telephone call. Trooper Werthmuller then proceeded to defendant's car and asked Joseph Caputo to produce his license and registration, which was done. After checking the license plates, Trooper Werthmuller retained the

license and registration and went to the passenger side of the car where defendant, James Caputo, identified himself. James Caputo was then directed to get out of the car. As he did so, Trooper Werthmuller observed a set of scales in the back seat, a can of mace on the floor and a box of .25 calibre pistol ammunition on the console. Joseph Caputo was then asked for the keys to the trunk of the car. A search of the trunk produced green plastic bags containing marijuana, and James Caputo was placed under arrest for possession of a dangerous drug. A suitcase in the trunk was then opened and found to contain more bags of marijuana. In the meantime, Troopers Kelleher and Alden had arrived, and a .25 calibre pistol with a clip containing six rounds of ammunition was found on defendant Joseph Caputo. He was also placed under arrest. It is conceded that the car was not stopped because of a violation of any Vehicle and Traffic Law or regulation; that the operator's license and the registration were in order; that Trooper Werthmuller observed nothing suspicious or illegal prior to asking James Caputo to get out of the car; and that the only basis for a belief that there were drugs in the car was the informant's telephone call.

Joseph Caputo and James Caputo have each been indicted for the crimes of criminal possession of a dangerous drug in the third degree (Penal Law, §220.20), and unlawfully possessing noxious material (Penal Law, §270.05). In addition, Joseph Caputo was indicted for the crime of possession of a dangerous weapon as a felony. (Penal Law, §265.05, subd. 2.)

The informant here was well known to the police and during the prior year, as a result of his information, 20 arrests had been made, and approximately 15 convictions had been obtained. In addition, the trooper observed the can of mace in open view on the floor of the car, the possession of which constituted a crime.

By reason of its mobility, the search of a car without a warrant might be reasonable (*Cooper v. California,* 386 U. S. 58), and whether such search is reasonable depends upon whether probable cause existed to sustain the arrest and search. (*McCray v. Illinois,* 386 U. S. 300.)

A search of a car may at times be justified by the belief "reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure or destruction." (*Carroll v. United States,* 267 U. S. 132, 149.)

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act." (*Brinegar v. United States,* 338 U. S. 160, 175.)

The totality of the circumstances herein completely justified the search and seizure, and the arrests of the defendants. (*People v. Rowell,* 27 N. Y. 2d 691.) The motions to suppress should have been denied.

The order should be reversed, on the law and the facts, and the motions to suppress the evidence seized from the automobile, should be denied.

HERLIHY, P. J. (concurring):

The reliability of the informant was conceded by the defendant and, as found by the trial court, there remained only the question of whether the information supplied was of such reliability and credibility as to permit the search of the automobile by the police officers without a warrant and which resulted in the criminal charges now under consideration.

In my opinion, under the present circumstances, if the police officers had not stopped the automobile, they would have been derelict in their duties. The officers who knew one of the defendants, after checking for motor vehicle violations, requested the passenger to alight from the automobile which he did. The officer then observed in the car a set of scales on the back seat and a can of mace on the floor of the automobile. He also observed a box of .25 calibre pistol ammunition on the console of the car. These observations, together with the information already supplied, constituted a sufficient basis for continuing the search by directing the defendant to open the trunk of the automobile where the officers found the drugs. Thereafter, a .25 calibre semi-automatic pistol was taken from the defendant Joseph whom the police officer testified he recognized and had known prior to the particular date.

These facts make clear the distinction between the present appeal and where a police officer, without probable cause, stops an automobile and conducts an unlawful search. (See *People v. Castro*, 29 N. Y. 2d 324; cf. *People v. Amanatides*, 39 A. D. 2d 1010.)

GREENBLOTT, J. (dissenting):

Although it is well-recognized that the tests applied to the validity of warrantless automobile searches are not as rigid as those applied to immovable premises, it is nevertheless fundamental that such a search must be incidental to a lawful arrest, supported by probable cause, or following closely in time and place an observation by the police of items of contraband in plain view when the police were in a lawful position to obtain such a view. None of these elements existed in the present case. It is clear that the search was not conducted incidental to a lawful arrest, because the officer testified that he did not place the defendants under arrest until after

discovering the marijuana in the trunk of the automobile.

Nor did the tip supplied by the unidentified informant furnish probable cause for a search, for although the reliability of the informant was conceded, it is also necessary to demonstrate that his information was reliable under the second prong of the two-pronged test laid down in *Aguilar v. Texas* (378 U. S. 108) and adopted by the Court of Appeals in *People v. Wheatman* (29 N. Y. 2d 337, 344, app. on other grounds 31 N. Y. 2d 12). There was no showing here of a factual basis for the informant's information. At best, the information was the mere conclusion of the informant, who did not even indicate that he had observed the activities of the defendants or that he spoke with personal knowledge. It is also significant that the informant failed to identify the type of drugs alleged to be in the defendants' possession. "For all that appears, the source here merely suspected, believed or concluded that there were narcotics in [defendants] possession" (*Aguilar v. Texas, supra,* at 113). There is no basis for judging the persuasiveness of the facts relied on to show probable cause. Mr. Justice Staley, in concluding that the reliability of the informant was established, points to the fact that a can of mace was observed in open view on the floor of the car.[1] In my opinion, this factor is irrelevant. The informant had not indicated that a can of mace might be found, and mace is in no way suggestive of marijuana or other drugs. Therefore, its presence in no way verifies or substantiates the accuracy of the tip which was actually given. I also find that *McCray v. Illinois* (386 U. S. 300) is not controlling. In that case, the officers "described with specificity 'what the informer actually said, and why the officer thought

[1]Whether or not the police officer was rightfully in a position to obtain this open view is a question I shall deal with subsequently.

the information was credible.' * * * The testimony of each of the officers informed the court of the 'underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the * * * information [was] reliable'" (*McCray v. Illinois, supra,* at 304). In the present case, there is no such testimony, but only as noted, the mere unsupported conclusion of the informer. It must therefore be concluded that the informant's tip did not establish probable cause to stop and search the defendants' vehicle.

This brings me to consideration of whether there was a lawful observation by the officer of contraband in plain view such as would justify a further search. Although I have determined that there was no probable cause for stopping the vehicle and the officer did not pretend to have done so for the purposes of a routine traffic check, I will nevertheless deal with this issue as if such a check might have been the proper purpose for the stop. When the officer stopped the car, he asked the driver, Joseph Caputo, to produce his driver's license and registration, which was done. The officer checked the license plates, and found nothing amiss. Up to this point, the officer had observed no contraband or other suspicious material, nor was there anything suspicious about the behavior of the defendants, who were the sole occupants of the vehicle. Hence, there was no valid or lawful reason for any further detention of the defendants. Nevertheless, the officer retained the license and registration and directed the defendant James Caputo, the passenger, to get out of the car. It was at this point that he observed a set of scales, a can of mace, and a box of ammunition in "plain view". Of course, it is well-settled that contraband in "plain view" may be seized and in some circumstances may justify a further search, but it is equally clear that this rule is not without qualification,

for it has repeatedly been said that only where the officer "has a right to be in the position to have that view" will the seized items be admitted into evidence because they are not the products of an illegal search. (*Harris v. United States,* 390 U. S. 234, 236.) Here, the officer may have rightly been where he was, but he had no right to improve his view by improperly directing the displacement of an obstacle, albeit a human obstacle. In no sense can the officer's observation of the mace and ammunition be said to have been fortuitious, as it might have been had James Caputo stepped out of the car voluntarily, revealing the items in question (cf. *People v. Battle,* 12 N. Y. 2d 866; *People v. Scianno,* 20 A. D. 2d 919, 920). At the moment the officer ordered James Caputo out of the car, which he no longer had a right to do nor any reason for doing it, thereby creating a view which had previously been closed to him, an illegal search commenced, and any extension of that search was equally invalid.

Mr. Justice Staley is of the opinion that "the totality of the circumstances" justified the search. I cannot agree, since it is clear that from the moment the officer received the tip until the moment he opened the trunk of defendants' car, he had no probable cause for conducting such a search, nor did any justifying circumstances arise, except perhaps as a result of the officer's improper actions, until the final act, and, of course, the discovery of contraband cannot validate an otherwise unlawful search.

I cannot agree with Presiding Justice Herlihy's opinion that the officer would have been derelict in his duties had he not stopped the automobile. In my view the officer was derelict in failing to ascertain such facts as would have established the reliability of the informant's information.

I, therefore, vote to affirm the decision of the County Court which granted defendant's motion to suppress the evidence.

APPENDIX B.

Decision Denying Motion for Resettlement of Order of Reversal.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

v.

JAMES MICHAEL CAPUTO,

Respondent.

19896A

May 23, 1973

Motion for resettlement of order entered March 27, 1973, denied, without costs. Application for certificate granting leave to appeal to Court of Appeals referred to Mr. Justice Cooke, who makes the following decision: Application denied.

Herlihy, P. J., Staley, Jr., Greenblott, Cooke and Main, JJ., concur.

APPENDIX C.

Order Denying Application for Certificate Granting Leave to Appeal to the Court of Appeals.

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK,

against

JOSEPH FRANCIS CAPUTO,

Defendant.

19896

THE PEOPLE OF THE STATE OF NEW YORK,

against

JAMES MICHAEL CAPUTO,

Defendant.

19896A

An application having been made by defendants for a certificate, pursuant to section 460.20 of the Criminal Procedure Law, granting permission to appeal to the Court of Appeals from an order of the Appellate Division, Third Judicial Department, entered March 27, 1973, which (1) reversed an order of the County Court of Washington County granting a motion to suppress evidence, and (2) denied the motion;

Now on reading and filing the notice of application, the affidavit of E. Stewart Jones, Jr., Esq., sworn to April 25, 1973, in support of the application, and the letter of Philip A. Berke, District Attorney of Washington County, dated May 9, 1973, and it appearing that the decision of the Court was on the law and the facts, it is

ORDERED that the application be and the same hereby is denied.

Dated: May 23, 1973

/s/ LAWRENCE H. COOKE
Associate Justice, Appellate Division,
Third Judicial Department.

APPENDIX D.

Order Denying Motion for Reargument of Appeal.

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, on the 16th day of July, 1973.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Ellis J. Staley, Jr.,
Hon. Louis M. Greenblott,
Hon. Lawrence H. Cooke,
Hon. Robert G. Main,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

JOSEPH FRANCIS CAPUTO,

Respondent.

19896

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

JAMES MICHAEL CAPUTO,

Respondent.

19896A

A motion having been made by E. Stewart Jones, Jr., of counsel for respondents, at this term of Court in the above-entitled appeal, for an order granting reargument in the above-entitled appeal; now, after reading and filing proof of due service of the notice of motion, the affidavit of E. Stewart Jones, Jr., of counsel for respondents in support of the motion and the affidavit of Washington County District Attorney, Philip A. Berke, in opposition thereto, and the Court having rendered a decision on the 1st day of August, 1973, it is hereby

ORDERED that, the motion for an Order granting reargument in the above entitled appeal is denied.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: August 15, 1973

A True Copy:
/s/ JOHN J. O'BRIEN
Clerk